

## **Attachment A**

### **Memorandum in Support of Using Electronic Signatures In Transactions Governed by the Electricity Restructuring Act**

After reviewing the Electronic Signatures in Global and National Commerce Act (“E-Sign”)(P. L. 106-229, enacted June 30, 2000), M.G.L. c. 164, sections 1 – 1F, and two bills pending before the Legislature; Uniform Electronic Transactions Act; Senate bills 1803 and 1805, DOER can recommend that DTE support the use of electronic signatures and other E-Commerce activities. This recommendation is conditioned upon the inclusion in regulation of certain consumer protections, as described in the February 27, 2001 Testimony of Linda Hamel, General Counsel, Information Technology Division, before the Senate Committee on Science and Technology.<sup>1</sup>

#### **Applicability of Federal Law**

E-Sign applies to “any transaction in or affecting interstate or foreign commerce.” The meaning of “affecting” has not been interpreted in the context of electricity markets. However, we believe that this statute applies to wholesale interstate transactions, not retail sales in the Commonwealth. Consequently, we do not rely on federal law to recommend the use of electronic signatures in the context of retail electricity sales transactions.

#### **State Law**

There appears to be no general prohibition in Massachusetts law against the use of electronic signatures or other E-Commerce mechanisms. Rather, the limited case law supports the use of electronic signatures. While c. 164, section 1F(8)(a) (consumer choice) does define “affirmative choice” as “the signing a letter of authorization,” it also provides that such choice may be made through the use of third party verification, or the completion of a toll-free call made by the customer to an independent third party...

Even if one construed “letter of authorization” to mean only hard copy, an interpretation not supported in current case law, section 1F(8)(a) neither expressly proscribes e-signatures or E-Commerce, nor limits an affirmative choice to a hard copy.

#### **State Policy on E-Signatures and E-Commerce**

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<sup>1</sup> This testimony provides recommendations about how the pending Massachusetts legislation could be improved upon, including language concerning consumers and consumer transactions that would withstand scrutiny when compared with the federal legislation.

State policy on electronic signatures and E-Commerce is extremely proactive. In a concerted effort to promote E-Commerce, the following state actions have been taken and are ongoing:

- (1) Currently the Massachusetts Department of Revenue (“DOR”) accepts electronic signatures on income tax return. Using the DOR’s PC File system, taxpayers can complete and file their income tax returns entirely electronically, no “wet” signature or telephone confirmation is required.
- (2) The Division of Information and Technology is compiling a list of all references in the Massachusetts General Laws to “signatures,” “writings,” “letters,” etc., in order to develop guidance about which laws need to be expressly amended and what, if any, legislation in addition to the pending legislation, is necessary to ensure that Massachusetts is an “E-Commerce Friendly” state. (Chapter 164 is on the list, but only those sections addressing corporate filings);
- (3) The E-Government Task Force is developing programs to make all government services available electronically. “E-Government liberates all the parties involved” appears to be the watchword for this effort;<sup>2</sup>
- (4) The Division of Information and Technology is working with both its public sector counterparts in other states and with private industry to develop the necessary laws and policies to promote, encourage, and implement E-Commerce. As set forth in his testimony before the U.S. House of Representatives, David Greenwood, Deputy General Counsel of the Division stated that law and government policy should be there to promote and support electronic commerce technology.<sup>3</sup>

## **Recommendation**

DOER recommends that DTE support the use of e-signatures and E-Commerce and that it investigate some of the applications specific to E-Commerce within in the electric industry in Massachusetts. However, implementation of such activities must be accompanied by stringent consumer protections to avoid slamming and/or other abuses of this electronic technology.

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<sup>2</sup> Executive Summary; The Promise of Electronic Government; (March 2001)

<sup>3</sup> Testimony of David Greenwood, Deputy General Counsel, Division of Information and Technology to the Financial Institution's Subcommittee of the Committee on Banking and Financial Services of the U.S. House of Representatives; September 18, 1997.